

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

3 - - - - - X
 4 MOOG INC.,) 22-CV-187
 Plaintiff)
 5 vs.

6 SKYRYSE, INC., et al) Buffalo, New York
 Defendant.) August 4, 2022
 7 - - - - - X

DISCOVERY HEARING

Proceeding held via Zoom for Government Platform

All parties appeared remotely.

Transcribed from audio of Zoom for Government Platform

10 TRANSCRIPT OF PROCEEDINGS
 11 BEFORE THE HONORABLE JEREMIAH J. MCCARTHY
 UNITED STATES MAGISTRATE JUDGE

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 LAI YIP, ESQ.
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15 -and-

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2 P R O C E E D I N G

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6 THE CLERK: Good afternoon, everyone. We
7 are at 3 o'clock. I'm not sure if we're expecting any
8 more people to join. But we do have a 4 o'clock, so I
9 would like to start promptly, if we could.

10 Is Mr. Lumish joining us?

11 MR. GROSS: Hello, everyone. This is Gabe
12 Gross from Latham. I'm on, Mr. Lumish won't be today.

13 THE CLERK: Okay. Anyone else for Skyryse?
14 I think I see all of --

15 MR. GROSS: Also from Latham, I've got my
16 colleagues Julianne Osborne, Arman Zahoory, Ryan Banks,
17 my partner, Alex Wyman, is on by audio, he has not yet
18 made an appearance or moved pro hoc vice. From Skyryse,
19 the general counsel, Jeri Looney is also joining us.
20 And we have, as always, our local counsel, Terry Flynn
21 from Harris Beach. I don't think I missed anybody, but
22 if I have, please speak up.

23 THE CLERK: Thank you, Gabe. Yeah, I guess
24 would Plaintiff and the individual Defendants also state
25 their appearances?

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2 MS. ANDOH: Hello, from Shepphard Mullin,
3 Rena Andoh, Lai Yip, Kazim Naqvi and Travis Anderson.
4 And from Hodgson Russ, Rob Fluskey and Pauline Muto.

5 MR. GREEN: From Winget Spadafora, you have
6 Anthony Green and Alex Truitt.

7 THE CLERK: All right. Thank you very much.

8 MR. GREEN: Sorry. You also have Annabelle
9 Mirales.

10 MAGISTRATE JUDGE MCCARTHY: Good afternoon.
11 I guess afternoon for everybody now. Good afternoon,
12 everyone.

13 MR. GROSS: Good afternoon.

14 MR. GREEN: Hello, your Honor.

15 THE CLERK: Judge, we stated appearances, we
16 can call the case.

17 MAGISTRATE JUDGE MCCARTHY: Please do.

18 THE CLERK: We are on the record in civil
19 proceeding 22CV187, Moog Inc v. Skyrise, Inc., et al.,
20 for a discovery hearing. Appearances by counsel have
21 been stated. The Honorable Jeremiah J. McCarthy
22 presiding.

23 MAGISTRATE JUDGE MCCARTHY: All right. Good
24 afternoon, again, everyone. Long time no see, but we
25 are back together. Just to kind of set the stage a

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2 little bit for what we will be addressing today, as you

3 recall, we spoke on, now, I believe, last Friday, last

4 Friday, yes. And then on Monday morning, I received an

5 e-mail from Ms. Andoh regarding the fact that the

6 individual Defendants were not going to be allowing

7 access to their devices, and so I set up a conference

8 for today. I asked for a response to that by yesterday.

9 I did receive that response from the individual

10 Defendants. And then last night, I've also received

11 several motions: A motion to stay by the individual

12 Defendants; motion to seal; a motion by Moog -- or, I'm

13 sorry -- motion by Skyryse, I guess, to order a source

14 code protocol; a motion to compel by Moog. And these

15 are docket numbers 210, 212, 213, 214 and 215. I have

16 available this afternoon, well, from now on, I have 55

17 minutes until 4 o'clock our time. Not that you have to

18 use the entire time, but I kind of suspect we will.

19 Then I have a couple of detention hearings on criminal

20 matters. So, I can't go beyond 4. And I don't intend

21 to delve in too great detail to the various motions that

22 were filed yesterday just because, A, I don't have the

23 time to do that today; B, I have not drilled down in any

24 great level of detail on the motions, although I'm

25 generally familiar with what they are seeking. But I

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2 want to focus, for today's purposes, on what
3 precipitated Ms. Andoh's August 1st e-mail, the fact
4 that the individual Defendants, I guess, shortly after
5 our conference last week, advised Moog that they were
6 going to rescind permission to access any of their
7 devices due to potential Fifth Amendment concerns. And
8 I guess my initial question is why didn't -- I know we
9 talked during the conference last week about the
10 possibility of a stay and the possible consequences of
11 Fifth Amendment concerns, and, in fact, I set a briefing
12 schedule on the motion to stay, which was going to be
13 argued in September, but I'm wondering why the fact that
14 the individual Defendants were going to prohibit access
15 to their devices wasn't put on the table during our
16 conference last week.

17 Mr. Green, I guess I'll ask you that.

18 MR. GREEN: Well, it came after
19 consideration of what we discussed in that conference,
20 and also further review of documents that indicated that
21 Moog has been acting hand in glove with the FBI and
22 acting almost as an agent of the government. And at
23 this point, given we're going to deal with the motion to
24 stay anyway, we're going to deal with Fifth Amendment
25 issues, it seems prudent to have -- to halt access, at

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2 this point, while we determine whether we need to assert
3 Fifth Amendment privileges. Because, by the time that
4 we performed our privilege review, it was for
5 attorney/client privilege, not the Fifth Amendment
6 privilege. This issue arose later, and I believe we do
7 need to go through those devices once we receive the
8 information I believe we need.

9 MAGISTRATE JUDGE MCCARTHY: Well, let me
10 just say, and we'll get into the merits of that, but
11 I'll just say at the outset that I really would have
12 preferred that that would have been put in issue during
13 our last conference because then I'm hit with a ton of
14 e-mails going back and forth. And these things could
15 have been at least flushed out in a somewhat more
16 orderly fashion had I been aware last week that this was
17 in the offing. But, be that as it may, let me ask
18 Moog's counsel, and if there is some reason work product
19 privilege or whatever else you want to raise as to why
20 you don't want to answer this question, I'll certainly
21 consider that, but whose idea was it to commence a
22 criminal investigation? I mean, did the Government, on
23 its own, just decide to do that, maybe reading something
24 in the paper somewhere, or did Moog precipitate the
25 criminal investigation?

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2 MR. FLUSKEY: Rena, do you want me to handle
3 that?

4 MS. ANDOH: Sure. I'm happy to do it,
5 either way.

6 MAGISTRATE JUDGE MCCARTHY: Let me ask,
7 because, Rob, I enjoy looking at your face every week,
8 but you haven't said much, so I'll hear from you.

9 MR. FLUSKEY: Sure. It's about time. I'm
10 glad to have an opportunity, Judge. Moog is not an
11 agent of the government.

12 MAGISTRATE JUDGE MCCARTHY: That is not my
13 question. My question was: Did Moog precipitate the
14 criminal investigation or did the Government decide to
15 do that on its own?

16 MR. FLUSKEY: The Government has made
17 requests for documents from Moog, and Moog has provided
18 documents to the FBI. Those documents have been
19 produced in this litigation, your Honor. Moog is not in
20 a position nor did it initiate proceedings, that is the
21 Government's prerogative.

22 MAGISTRATE JUDGE MCCARTHY: I understand
23 that Moog can't initiate criminal proceedings. I'm just
24 trying to get the lay of the land here because it does
25 strike me as -- well, let me say this. If I were

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2 representing Moog and if I felt trade secrets had been
3 stolen, I probably would be proceeding along two tracks
4 simultaneously as well. But, it does seem to me we've
5 gone a bit down the road with various protocols and
6 stipulations being agreed to, and then, come to find
7 out, that there is a criminal investigation which Moog
8 clearly knew about before it commenced the civil
9 litigation. So, I'm trying to balance fairness and
10 interest of everybody, but, I do see the individual
11 Defendants' position that when they agreed to limited
12 bases for asserting privilege, at least they claimed
13 they didn't know there was a criminal investigation
14 ongoing.

15 Before I hear from you again, let me go back
16 to Mr. Green. Your affidavit says that you found that
17 out from the individual Defendants' criminal attorneys,
18 so, I mean, when did you learn that there was an ongoing
19 criminal investigation? And when I say "you," I mean
20 you collectively, you or your clients or whatever.

21 MR. GREEN: I don't know when my clients
22 did, but I believe I learned sometime in the earlier
23 part of July. And after that, the criminal counsel had
24 to get up to speed on the case and we needed to
25 coordinate with them in order to determine the best way

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2 forward.

3 MAGISTRATE JUDGE MCCARTHY: But, in any
4 event, that was after the protocol was entered into and
5 the various stipulations, is that right?

6 MR. GREEN: Yes, and after we had made
7 devices available.

8 MAGISTRATE JUDGE MCCARTHY: Yeah. All
9 right. Mr. Fluskey, back to you. I didn't mean to cut
10 you off if there was something else you were going to
11 say.

12 MR. FLUSKEY: Your Honor, I would like to
13 clarify the timeline, because I don't believe the
14 timeline that you just heard is accurate. So the
15 individual Defendants made 17 devices available to Moog
16 through IDS on June 30th. Okay. As of that date,
17 individual Defendants knew full well there was a
18 criminal investigation for multiple reasons. Let's
19 start with the easiest. I have in front of me a letter
20 I sent to your Honor on June 10th, copying everyone on
21 the Zoom call. In that letter, Moog sought limited
22 relief from the seal in this case because the FBI had
23 requested a transcript. Let me read to you what I said
24 in that letter.

25 MAGISTRATE JUDGE MCCARTHY: Let me just add,

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2 is the letter part of the record or no? I just don't
3 recall it right now.

4 MR. FLUSKEY: Your Honor, the letter was
5 sent by e-mail. And then after we sent our e-mail, you
6 asked whether the other parties consented to Moog's
7 request for limited relief from the seal. Skyryse
8 promptly consented, and on June 13, Mr. Green consented.
9 So, I don't believe it's on the docket. I have to
10 double check that. But there was e-mail correspondence.
11 And, actually, here is what I said in the letter.

12 "A Special Agent of the Federal Bureau of
13 Investigation has requested that Moog provide the FBI
14 with unredacted versions of the transcripts from the
15 April 26th and many conferences before your Honor. We
16 understand that this request was made in connection with
17 an ongoing federal investigation into the files taken
18 from Moog that are the subject of this lawsuit."

19 Now, we believe the individual Defendants
20 must have known before June 10. We don't know when they
21 got their grand jury subpoena, but, certainly, by June
22 10, they knew full well that the federal government was
23 investigating this and that the FBI was asking Moog for
24 documents relating to this case. And they consented to
25 what I asked for in this letter. Twenty days later,

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2 long time to contemplate implication of Fifth Amendment
3 privilege, on June 30, the individual Defendants
4 authorized access, authorized Moog's access to 17
5 devices. We're now hearing that somehow Moog duped them
6 into that voluntary waiver and that disclosure, and the
7 timeline belies that contention. It's beyond dispute
8 that the individual Defendants knew that the federal
9 government was investigating this matter long before
10 they voluntarily surrendered access to those devices.
11 And, again, we don't know when the documents subpoena,
12 the grand jury document subpoena, was sent to the
13 individual Defendants, but it could have been even
14 before June 10, but there can be no question about June
15 10 that everyone knew at that point. In addition,
16 shortly thereafter, Moog produced, in this case, its
17 communications with the FBI. It offered -- it suggested
18 that all parties produce to each other the documents
19 produced to the government in response to subpoena. So,
20 your Honor, Moog has been transparent on this point from
21 day one.

22 And one other important point. The
23 individual Defendants appear to be contending that a
24 criminal investigation is somehow a prerequisite for
25 invocation of the Fifth Amendment. That is not true.

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It's not true at all. Nothing prevented the individual Defendants from considering these rights from day one. The minute they got our Complaint, what did they know? They knew Moog was accusing them of theft, theft of intellectual property under the DTSA, which has a criminal provision. They knew Moog was accusing them of theft of documents, documents in which the Government had an interest. It's all in the Complaint. So, at that point, Fifth Amendment rights could have been fully analyzed and invoked. But what happened after that? We spent hours of counsel's time, client's money and the Court's time agreeing to a TRO. A TRO which required them to turn over these devices. And that is an important point. That is often overlooked. This is not informal discovery. We then spent time agreeing to an ESI protocol ordered by this Court that governed the relationship between IDS and counsel and the review of these materials. So, two days after our last conference, when the individual Defendants unilaterally cut off Moog's access, what were they doing? They were granting themselves interim relief on a motion to stay that had not even been briefed and they were effectively retracting compliance with two court orders. This case is busy. We have no reason to raise collateral disputes

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2 that have no consequence. This one is consequential.
3 We have orders in place and there are directives and
4 processes. And when the Defendants decide, without
5 bringing it to the Court's attention, without giving us
6 prior notice, without initiating a meet and confer, to
7 direct IDS to cut off our access, they were violating
8 those processes. And what is the consequence, more
9 delay. And in a preliminary injunction proceeding,
10 delay is prejudice to the Plaintiff per se. We've been
11 waiting a long time to look at these devices. If I were
12 the Defendants, I probably wouldn't want to give us
13 access either. But that is not how the discovery
14 process works. So, Judge, what we see in the e-mail
15 from the individual Defendants' counsel last night is
16 that somehow we misled the Court, misled them and duped
17 them into a knowing waiver of privilege. It's just not
18 true. It's false. And I think the allegations are
19 irresponsibly presented, especially in light of the June
20 10th letter to the Court.

21 So, what are we asking for here? We know
22 that the issue of privilege and waiver is going to be
23 fully briefed and heard in September. What we're asking
24 for here, Judge, is pretty narrow. We're asking you to
25 restore the status quo that was in place on July 27th

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2 when we discussed these issues before your Honor. At
3 that time, Moog had access to 17 devices. It had
4 access, because the individual Defendants gave us
5 access, with full knowledge of an ongoing criminal
6 investigation.

7 Now, one more point. In the e-mail that we
8 got from the individual Defendants' counsel, it seems
9 their main argument in support of this retraction of the
10 devices is a protective order, and, specifically,
11 section 16 of the protective order. There is a clawback
12 provision, your Honor. Those provisions don't apply for
13 multiple reasons. First of all, we don't think they
14 even encompass Fifth Amendment privilege. They are
15 designed to encompass work product and attorney/client.
16 But that issue is not even ripe. In order to invoke the
17 clawback provisions of the protective order, you need to
18 assert the privilege. The individual Defendants have
19 asserted no Fifth Amendment privilege in this case. And
20 under the clawback provisions, after you assert the
21 privilege, you have to identify specifically the
22 documents over which you're asserting privilege and then
23 the receiving party, here Moog, has the right to object
24 to that assertion and can retain a copy of the allegedly
25 privileged materials to assess whether the privilege

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2 applies. None of that happened here. So, the
3 protective order upon which the individual Defendants
4 are relying, well, they didn't comply with it. So that
5 argument can't apply. And in nowhere in their e-mail do
6 we see a single case which stands for the proposition
7 that a Defendant can retract a document produced in
8 litigation or device based on the Fifth Amendment. The
9 Fifth Amendment doesn't allow for take backs. That is
10 what we're dealing with here. We're dealing with
11 documents and devices that were surrendered and then
12 retracted.

13 So, again, your Honor we're not looking to
14 hear or have you rule on the fundamental issue of
15 whether this privilege can even apply or whether there
16 should be a stay. We simply want the status quo
17 restored so we can continue to review these materials
18 while the motion is pending.

19 MAGISTRATE JUDGE MCCARTHY: Mr. Fluskey, you
20 made a statement a few minutes ago that I, if I heard
21 you correctly, it impressed me as significant. I think
22 what you said is, if you were in their shoes, you
23 wouldn't turn them over, either. So it seems -- or
24 something to that effect. It seems to me that your
25 principal argument then, at this stage then, is first,

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2 of all, you're saying they haven't asserted a privilege.
3 I understand where they are coming from, but it seems to
4 me that your argument is that if there was a privilege,
5 a Fifth Amendment privilege, it has been waived by their
6 voluntary providing of access to the devices with
7 knowledge that a criminal investigation was either
8 commenced or likely to commence. Is that your argument?

9 MR. FLUSKEY: Your Honor, that is one of my
10 arguments, yes. The other, more fundamentally, is they
11 haven't asserted the privilege.

12 MAGISTRATE JUDGE MCCARTHY: Yeah, they
13 haven't asserted the privilege. And what they say is
14 they will, in a protective measure, they will assert a
15 privilege over everything because they don't know what
16 exactly you're claiming to be the trade secrets that
17 they stole. I mean, I can see that. That gets us back
18 to what I've characterized previously as "the chicken
19 and the egg problem," which is who goes first. And I
20 had ruled on July 22nd that Skyryse was going to be
21 obligated to give a detailed identification of its trade
22 secrets that it contended were at issue in this case,
23 excuse me, Moog, not Skyryse. Moog was going to be
24 required to give that detailed identification, but that
25 they were going to be given the opportunity to have

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2 access to Defendant's information solely to the extent
3 that they needed to enable themselves to make that
4 global identification so that we will not be proceeding
5 in a piecemeal fashion, for example, by starting
6 depositions and then finding out that now there is
7 another trade secret asserted and possibly having to go
8 back. So, I clearly, in my July 22nd Decision and
9 Order, I did not order Skyryse to make that
10 identification immediately. In fact, that is one of the
11 issues that we were or were discussing last week.

12 Let me, Mr. Green or anybody else on behalf
13 of the individual Defendants, what about that? As Mr.
14 Fluskey was saying and making reference to these various
15 e-mails, I'm looking at my e-mail chain on Lotus Notes,
16 and I do see what he is talking about. I think on June
17 10th, there was a request for relief. And then there is
18 an e-mail from you saying no objection from the
19 individual Defendants. I believe that was on June 13th.
20 So, at that point, it seems to me that you should have
21 known, if you didn't actually know, that there was the
22 potential of a criminal investigation.

23 MR. GREEN: Well, your Honor, that
24 communication doesn't say that our clients are the
25 subject of the investigation. That we learned later.

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2 And what we also didn't know at the time was that, and

3 we only learned in July, that Moog was talking to the

4 FBI before the action was filed. They have been having

5 biweekly meetings. I suppose they have been, even

6 though they are claiming everything in this action is

7 top secret, and that is kind of inappropriate when they

8 are then funneling information right back to the

9 government. And what we also didn't know, and let's

10 also go back to the Fifth Amendment and how important

11 this is, and a waiver is not to be inferred lightly. It

12 has to be knowing, voluntary and intelligently waived.

13 And what we also didn't know is what we still don't know

14 today, which is what the trade secrets are, what the

15 confidential information is, what the classified

16 information is. And as we've made clear in our papers,

17 they can make that, they can make that disclosure.

18 They are conflating two separate issues.

19 One issue is what are the trade secrets; and the other

20 issue is were they misappropriated. Which trade secrets

21 were downloaded by my clients. That is what we're

22 asking them to identify. They can do that. They have

23 that in their information. They've been able to tell us

24 how many files were taken. They can go through it and

25 their own guidelines require them to mark things as

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2 trade secrets. And Federal guidelines require you to
3 mark things as "classified," because the person who gets
4 them has to know what they are using, what they are
5 being involved in. So they can make that
6 identification. Whether they can go onto the second
7 element and show misappropriation or damages, that is a
8 different inquiry. So, I don't think there actually is
9 a chicken-and-egg situation.

10 But, if we go back to the protective order,
11 I do want to point this out. If you read the definition
12 of "privileged material," and I'll read it right here,
13 it means, "discovery material protected from disclosure
14 under the attorney/client privilege, attorney work
15 product doctrine, United States or foreign bank
16 disclosure laws or regulations and/or any other
17 applicable United States or foreign statute, law,
18 regulation, privilege or immunity from disclosure." So,
19 this idea that it's only limited to the first two
20 examples of what privileged material is is a complete
21 red herring. We've provided notice that we were clawing
22 it back and all it says, what we had to do is merely say
23 that it's subject to a claim of privilege or other
24 protection. And, at this point, based on what we know,
25 it may all be. We just don't know because Moog won't do

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2 what every other trade secret Plaintiff does, which is
3 tell you what the case is about in the first place so we
4 can identify what should and should not be claimed as
5 privileged. So, I think there was a great deal that we
6 did not know at the time that we made devices available,
7 that has only since come to light.

8 MR. GROSS: Your Honor, if I may.

9 MAGISTRATE JUDGE MCCARTHY: Yes, Mr. Gross.

10 MR. GROSS: Thank you, your Honor. On
11 behalf of Skyryse, we're not going to take a position on
12 this particular motion, but I do think, as a factual
13 matter, it may be helpful to point out some of the
14 chronology in the docket, including the stipulation and
15 order that required the turn over of devices to IDS that
16 was negotiated and agreed to by the parties and entered
17 by the Court back in March. That is March 11th. The
18 relevant docket numbers are 25 and 28. And the
19 stipulation that required expedited discovery was the
20 next week on March 17th. That is docket No. 33. And I
21 offer that for full context because that was a few
22 months before the June 10th letter that Mr. Fluskey
23 pointed out.

24 MR. FLUSKEY: May I respond, your Honor?

25 MAGISTRATE JUDGE MCCARTHY: I didn't know if

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2 Mr. Gross was done. Are you done?

3 MR. GROSS: I am. I wanted to provide the
4 event and dates as context.

5 MAGISTRATE JUDGE MCCARTHY: Okay. Thank
6 you.

7 Mr. Fluskey.

8 MR. FLUSKEY: Your Honor, the disclosure at
9 issue here today occurred on June 30th. The 17 devices
10 that the individual Defendants decided unilaterally we
11 could no longer see were made available on June 30th.
12 There is no doubt that they knew or should have known
13 that a criminal investigation was under way when they
14 made that disclosure. So, there is no basis for a
15 retraction under some type of fraudulent inducement
16 theory, which is what I think I'm hearing. Now, when
17 the protective order -- so, to me, the only basis,
18 possible basis, for a clawback here is the protective
19 order. And I think it's beyond dispute, it doesn't
20 apply. Whether the protective order encompasses the
21 Fifth Amendment, even if it did, Section 16, the
22 clawback provision requires the assertion of the
23 privilege. So, the provision is not even triggered if
24 you say, well, I might assert a privilege in the future,
25 I have to think about it. And then even if you do

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2 assert the privilege, you got to identify with
3 particularity what is privileged and Moog would still
4 get to keep a copy for the purpose of assessing whether
5 the privilege applies. And, your Honor, I'm not sure we
6 do believe there has been a waiver, certainly, of the
7 entire Fifth Amendment privilege, but certainly on these
8 devices. But, what Moog is not contending is that if
9 this Court allows us to continue reviewing the 17
10 devices, that is to say, return to the status quo, that
11 that order or that forward-looking review constitutes
12 waiver. If there was a waiver, it already happened.

13 So, again, what we're asking for is to
14 restore the status quo. We don't see any basis in the
15 case law or in the protective order for the retraction
16 or for the clawback. And, clearly, Moog did not conceal
17 or mislead anybody about the Government's interest in
18 this case before, at any time, and clearly not before
19 June 30th, which is when the disclosure occurred.

20 MAGISTRATE JUDGE MCCARTHY: Okay. Anybody
21 else want to weigh in on this issue?

22 MR. GREEN: Yes, your Honor. I don't see
23 anywhere in Section 16 that there needs to be a claim of
24 privilege, but --

25 MAGISTRATE JUDGE MCCARTHY: Would somebody

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2 please turn me to the docket number for that document?

3 MR. FLUSKEY: Document No. 89, your Honor.

4 MAGISTRATE JUDGE MCCARTHY: Let me get to
5 it, please. Protective order, May 6th. All right.

6 Now, Mr. Green, you were going to cite me to
7 a particular provision of that.

8 MR. GREEN: It's Section 16, but I do want
9 to make another point.

10 MAGISTRATE JUDGE MCCARTHY: Let's just stick
11 on this while it's in my mind and then you can go to
12 your other point. Let me go to Section 16. All right.
13 Clawback. Okay. What were you going to say about
14 Section 16?

15 MR. GREEN: That it doesn't say what Mr.
16 Fluskey has been saying it says. And, either way, we
17 are making a somewhat blanket privilege because we
18 haven't been given the information to make it any more
19 narrow. And I wanted -- even if Mr. Fluskey was
20 correct, that making those -- making those devices
21 available could have created any sort of waiver, well,
22 then they need to tell us what they already looked at.
23 And if they've already looked at everything, then why
24 haven't they identified the trade secrets since this is
25 apparently what they've been waiting for. If they

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2 haven't looked at it yet, then there hasn't been any
3 waiver because it hasn't actually been disclosed. But I
4 don't think there has been waiver, in any event, when
5 you consider all of the things that we did not know and
6 the importance of the Fifth Amendment right, and the
7 fact that we're going to be dealing with these issues on
8 the motion to stay. And after the motion to stay,
9 however it's resolved, we're going to be dealing with
10 these issues. So, I don't believe we need to determine
11 right now whether there is going to be a waiver,
12 especially when, you know, we continue to contend that
13 they have not identified the trade secrets, even though
14 they are able to. They are --

15 MAGISTRATE JUDGE MCCARTHY: But, Mr. Green,
16 the difference between now and last week when we set up
17 the briefing schedule on the stay motion, which was not
18 going to be argued until September, I think the status
19 quo or the status of events at that time was there was
20 not going to be an, at least when we were talking, now
21 later Friday, I guess that position changed, but when we
22 were talking, Moog was going to be able to continue --
23 access to the individual Defendants' devices was not
24 going to be prevented. That just came up after the
25 conference. So, you know, we can say, yeah, well,

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2 nothing is going to be decided until September about
3 whether the action is stayed or not, but, in the
4 interim, things could have been going on and now your
5 position is that nothing can go on vis-a-vis, their
6 devices. So, that, to me, is the difference. Whether
7 you're right or wrong is another question. But, that is
8 how I see it.

9 Let me ask, and I don't want to throw --
10 I'll get back to you, but I don't want to throw another
11 issue on the table that maybe is not an issue, but I
12 guess I'll direct it to Mr. Gross. Let me preliminarily
13 address it to everybody. Do I pretty well understand
14 that nobody knows what the government intends to do,
15 whether they intend to charge anybody, whether they
16 intend to charge the individual Defendants or Skyrise or
17 anybody, right? Nobody knows that, is that correct?

18 MR. FLUSKEY: Correct, your Honor.

19 MR. GREEN: Well, I don't believe that is
20 true, because from what our client's criminal counsel
21 have been told, you know, semi recently, is that our
22 clients actually are the subject of the investigation.
23 And it's fairly rare, I don't practice criminal law, but
24 according to our counsel, it's fairly rare to be told
25 prior to the grand jury investigation that you are the

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2 subject. So, I think we do know where this is headed.

3 MAGISTRATE JUDGE MCCARTHY: Okay. Do I
4 understand correctly then, and I guess I'll ask Mr.
5 Gross, has Skyryse received any similar type of
6 communication from the Government?

7 MR. GROSS: Skyryse has been contacted by
8 the Government, and we've communicated with them and are
9 cooperating. We won't purport to know what position the
10 Government may be taking, though.

11 MAGISTRATE JUDGE MCCARTHY: Okay. But
12 you're not asserting any privilege, any Fifth Amendment
13 privilege with respect to your information, correct?

14 MR. GROSS: No, we are not. On behalf of
15 Skyryse, the corporation, that's correct.

16 MAGISTRATE JUDGE MCCARTHY: Right. Okay.

17 MR. GREEN: Your Honor, if I can make
18 another point. Every disclosure that we've made, even
19 on June 30th, it was pursuant to the orders that we
20 agreed to before we, indisputably, before we had any
21 knowledge that Moog was working with the Government, was
22 having biweekly meetings, was in instigating a criminal
23 investigation of our client or had any idea that there
24 was going to be a criminal investigation, and what
25 should have stayed a civil matter. So, all of the

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2 disclosures flowed from orders and agreements that were
3 entered into without that knowledge.

4 MAGISTRATE JUDGE MCCARTHY: All right.
5 Anybody else on this issue?

6 MR. FLUSKEY: Your Honor, if I could just
7 very briefly.

8 MAGISTRATE JUDGE MCCARTHY: Yes.

9 MR. FLUSKEY: There is a fundamental process
10 here in addition to this set of issues, which is, the
11 individual Defendants shouldn't be permitted to exercise
12 self help like this. We were here just on the 27th and
13 discussed these issues. They did not seek emergency
14 relief, interim relief. They just took it upon
15 themselves to claw back access to these devices where
16 there are two orders at issue that govern. And we just,
17 we don't think that conduct can be, should be,
18 permitted. That, in itself, we believe is enough to
19 restore the status quo. But, in addition to that
20 process point, there is no basis for the retraction of
21 Moog's access to these materials. The protective order
22 doesn't provide for it. And there is not a single case
23 cited in these e-mails that allows for a take back under
24 the Fifth Amendment after you've made documents
25 available to an adversary.

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2 MR. GREEN: Your Honor, there is a clawback
3 provision.

4 MAGISTRATE JUDGE MCCARTHY: Counsel, and I'm
5 going to look at the clawback provision, let me just say
6 this. I'm going to say this to all of you. As you
7 know, if you look at your clocks, Buffalo time, it is
8 now 3:41, so I have 19 more minutes to give to you and
9 then, much as I would love to stay on with you, I have
10 to go to other matters. And I mean that. I'm not being
11 sarcastic when I say, "love to stay on with you,"
12 because we need to. I need to fully understand what's
13 at play here. But, nonetheless, what I intend to do,
14 because, basically, this particular issue that we've
15 been talking about here has all come up by way of an
16 e-mail or e-mail exchange. It has not come up by way of
17 formal motion practice. And I think I need to rule on
18 that. And I want to do that on a more formal record,
19 which we can accelerate as quickly as you want to do.
20 But, I think we need to do that. So I'm going to come
21 back to that in a minute, and we can talk about more
22 briefing, you know, an accelerated briefing schedule on
23 that issue. We'll talk about the other motions on some
24 other day.

25 Let me ask you this. It occurs to me now --

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2 well, let me ask a preliminary question first. Skyryse
3 is in California, correct?

4 MR. GROSS: Yes, your Honor, (inaudible)
5 California, Central District.

6 MAGISTRATE JUDGE MCCARTHY: The individual
7 Defendants are in California, correct?

8 MR. GREEN: That is correct, your Honor.

9 MAGISTRATE JUDGE MCCARTHY: When they were
10 working for Moog, were they in California?

11 MR. GREEN: Yes, they were.

12 MAGISTRATE JUDGE MCCARTHY: So, we now have
13 a criminal investigation in California that may or may
14 not result in criminal charges, and we have a civil case
15 in New York, as to which motions are pending before
16 Judge Vilardo for either dismissal for lack of
17 jurisdiction or for transfer of venue. In light of the
18 criminal developments, does anybody intend to supplement
19 those motions and bring this information to Judge
20 Vilardo's attention? Because, frankly, and I have not
21 studied those issues, but if we stay in New York on the
22 civil case and we've got a criminal investigation in
23 California, that may or may not result in criminal
24 charges. If it does, I presume those charges are going
25 to be brought in California. I'm just wondering in

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2 terms of judicial efficiency, what is the best way to
3 proceed. Those motions are not before me, but it seems
4 to me somebody may want to bring these developments to
5 Judge Vilardo's attention. If anybody wants to react to
6 that, you're welcome to, or, if you chose not to, that
7 is your prerogative as well.

8 MR. GROSS: Your Honor, this is Mr. Gross
9 for Skyryse. And I appreciate you bringing up the
10 issue. It's a little sensitive. We understand the
11 confidentiality concerns around any government
12 investigation, which Skyryse, of course, respects. It
13 is our understanding that an investigation by the
14 Government in the Central District of California, if it
15 were to lead to charges, would be to charges there. And
16 we think it's important the Court, and you obviously
17 understand, that there are these other proceedings
18 pending in that jurisdiction. So, we would like a
19 little time to think about if and when and whether to
20 formally raise the issue with Judge Vilardo. I know
21 that the two proceedings, while they have some factual
22 overlap, are not technically related, but we appreciate
23 the time to think about it.

24 MAGISTRATE JUDGE MCCARTHY: How can they not
25 be related?

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2 MR. GROSS: As a matter of proceedings, any
3 criminal investigation --

4 MAGISTRATE JUDGE MCCARTHY: I mean, they are
5 not obviously consolidated, they can't be, but I got to
6 believe that whatever the criminal investigation is is
7 in some way related to the issues in this civil
8 litigation. I mean, how can they not be?

9 MR. GROSS: I certainly agree that the
10 factual issues overlap. I don't mean to suggest
11 otherwise. I mean, as a matter of judicial proceedings,
12 I don't view them as one in the same.

13 MR. GREEN: Right, right.

14 MAGISTRATE JUDGE MCCARTHY: I didn't
15 understand you to be suggesting that. All right. All
16 right. Well, in any event, let's go back to what we're
17 going to do about this issue of the so-called self help,
18 and I'll just use Mr. Fluskey's characterization,
19 whether that is accurate or not, but, in any event, the
20 issue on the table and the reason I scheduled this
21 hearing today was to address solely that issue, which is
22 can the Defendant, the individual Defendants, be allowed
23 to block access to their information based on a Fifth
24 Amendment. And I would like to just get a more formal
25 record on that issue.

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2 So, Mr. Green, you took the step initially,
3 so I think it should be -- well, I don't care who brings
4 it formally first, one side or the other, but somebody
5 has either got to make a motion for relief in respect to
6 that, and I will you know, we'll get to it as quickly as
7 we can. But you tell me when you can file motions and
8 respond, et cetera. I'm all ears.

9 MS. ANDOH: Your Honor, if I can, I think, I
10 don't know that it's proper for us, the moving party, to
11 reserve the status quo, so I'm a little concerned about
12 taking on the responsibility of being the one to file
13 the motion, because it seems like the burden should be
14 on them to demonstrate why it is that they have the
15 right to disrupt the status quo in this instance.
16 Having said that, your Honor, given the nature of the
17 issue here and the speed with which we require
18 resolution of it, can I just suggest that we, instead,
19 do a simultaneous submission and it be deemed a motion,
20 because you already have all sides' position, so then
21 you can set a date for submission.

22 MAGISTRATE JUDGE MCCARTHY: Ms. Andoh, that
23 is fine with me. I just don't want anybody saying
24 you're deciding something on e-mails that are not part
25 of the record. We've had this informal procedure, which

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2 was my suggestion, and I've used it in other cases, but

3 I do recognize as well that there are limits to when

4 that procedure is or is not appropriate. And I think

5 since either the individual Defendants are asking me to

6 give judicial approval to what they've done or Moog is

7 asking me to tell them they can't do that, so, court

8 relief is being requested one way or the other, and I

9 just, if you want to do a simultaneous submission, that

10 is fine with me. However you want to do it will work.

11 I do recognize that this is an issue that needs to be

12 decided sooner or later, and I also recognize that. And

13 I'm not saying which way I'll go on this. Frankly, I

14 don't know. But if I were to say to the individual

15 Defendants, no, you have to provide access since it

16 arguably involves a question of privilege and Fifth

17 Amendment, and I recognize the opposing view that it

18 doesn't, but, in any event, I would probably stay my

19 decision to give, at least for a short period of time,

20 to give somebody the opportunity to seek further review

21 by Judge Vilardo. And I'm not suggesting that you take

22 it to him initially, because I think it makes more sense

23 to let me rule on it initially. I'm much more familiar

24 with the underlying facts right now than he is.

25 Although, I will point out that his law clerk, Will

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2 Haze, is listening in, so if he, in consultation with
3 Judge Vilardo, wants to take a crack at it instead of
4 me, I say God bless you, go ahead. But, if not, I will
5 take the first shot at it. Okay.

6 So, having said all of that, who wants to
7 file what and when?

8 MS. ANDOH: Your Honor, I would just suggest
9 that we, I mean, once again, the advantage of your
10 Honor's procedures is that everybody is very clear on
11 the positions that both sides are taking. There are no
12 surprises at this point. The issues have been flushed
13 out thoroughly with respect to both sides. Given that,
14 I renew my suggestion the Court order a simultaneous
15 submission of briefs, and it be a single shot, because,
16 again, I mean, both sides have already submitted their
17 opening shot, so to speak, and your Honor has flushed
18 out the issues in a very detailed manner in this
19 briefing. So, you know, I think it would make sense,
20 and, again, we don't want to wait until September
21 because, from our perspective, the status quo and our
22 ability to move towards making this identification that
23 your Honor instructed us to make is being impacted by
24 this revocation, so --

25 MAGISTRATE JUDGE MCCARTHY: Ms. Andoh.

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2 MS. ANDOH: I think maybe the 11th, a week,
3 we submit to you, and you have both sides briefs. And
4 then if you require further argument, we're happy to
5 provide it, but, otherwise, it just goes to your Honor.

6 MAGISTRATE JUDGE MCCARTHY: You're
7 suggesting the 11th?

8 MS. ANDOH: I would suggest sooner, but I
9 assume that we're going to get objections on it. I
10 think we could submit briefs on Monday, on the 8th. I
11 don't think anything new is going to get argued here.

12 MAGISTRATE JUDGE MCCARTHY: Mr. Green, did
13 you want to say something?

14 MR. GREEN: Your Honor, I'm fine with
15 simultaneous submissions on the 11th, but I think we
16 should also be able to simultaneously submit opposition
17 on the 18th, because if what we're submitting on the
18 11th is it, and Ms. Andoh is suggesting that everything
19 has already been laid out in e-mails, I don't believe it
20 has. There would be no reason for briefing if we're not
21 going to address potential other legal arguments that
22 are made.

23 MAGISTRATE JUDGE MCCARTHY: Mr. Green, okay,
24 here is what I'm going to do. And I don't mean to ruin
25 anybody's weekend, but so be it. Simultaneous briefing

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2 by August 11th, reply briefing by August 15th. And then
3 I will decide it on the submissions. I don't need any
4 additional further argument. And I would just suggest
5 that, you know, there is -- reference has been made
6 today to, like, the June 10th letter and various
7 e-mails. Make those factors part of the record in some
8 fashion or other, okay? And, again, I'm not saying that
9 I'm swayed by the June 10th letter or not, but I
10 certainly want to consider all of that. Okay?

11 MR. GROSS: Your Honor, if I can just raise
12 one related issue. Whether or not there will be
13 discovery available from the individual Defendants,
14 obviously, has an impact on Skyryse, as much as the
15 other parties, and how this case will be resolved. In
16 the meantime, there are lots of related discovery issues
17 and deadlines pending. And coming up, there are
18 subpoenas that require responses to. I'd like to
19 suggest that, since this Fifth Amendment issue is tied
20 to the stay issue, which that affects all discovery, I
21 would like to suggest a vacatur of all pending discovery
22 deadlines until the issue is resolved.

23 MS. ANDOH: I believe Judge McCarthy
24 actually ordered that at the last hearing.

25 MR. GROSS: If that is the Court's intent,

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2 then I really appreciate that clarification. That would
3 be fine with Skyryse.

4 MAGISTRATE JUDGE MCCARTHY: Consider it
5 clarified.

6 MR. GROSS: Thank you.

7 MAGISTRATE JUDGE MCCARTHY: All right. Then
8 I will -- we'll proceed along those timelines. And,
9 again, the other motions that were filed, we will get to
10 them, but we'll take it from there. And thank you all
11 and I brought it in with seven minutes to spare. So
12 there we go. Thank you all.

13 MR. GREEN: Thank you, your Honor.

14 MS. ANDOH: Thank you, your Honor.

15 MR. GROSS: Thank you, your Honor.

16 * * *

17 CERTIFICATE OF REPORTER

18
19 I certify that the foregoing is a correct transcript
20 of the record to the best of my ability of proceedings
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